

Mark E. Ellis - 127159
Anthony P. J. Valenti – 284542
Lawrence K. Iglesias – 303700
ELLIS LAW GROUP LLP
1425 River Park Drive, Suite 400
Sacramento, CA 95815
Tel: (916) 283-8820
Fax: (916) 283-8821
mellis@ellislawgrp.com
avalenti@ellislawgrp.com
liglesias@ellislawgrp.com

Attorneys for Defendant RASH CURTIS & ASSOCIATES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SANDRA McMILLION, JESSICA ADEKOYA,
AND IGNACIO PEREZ, on Behalf of
Themselves and all Others Similarly Situated,

Plaintiffs,

v.

RASH CURTIS & ASSOCIATES,

Defendant.

Case No.: 4:16-cv-03396-YGR JSC

**DEFENDANT RASH CURTIS &
ASSOCIATES' OPPOSITION TO
PLAINTIFF'S MOTION *IN LIMINE* NO. 8**

Judge: Hon. Yvonne Gonzalez Rogers

Trial Date: May 6, 2019

1 **OPPOSITION TO PLAINTIFF’S MOTION *IN LIMINE* NO. 8**

2 Plaintiff seeks to exclude, on the basis of irrelevance and unfair prejudice, any testimony or
3 statements having to do with Rash Curtis’ inability to pay the nine-figure damages award sought in
4 this case.

5 Plaintiff’s experts intend to testify that the class members are entitled to an award of more than
6 **\$802 million** in statutory damages. But the issue here has less to do with any “unfairly prejudicial”
7 testimony from Rash Curtis within the meaning of Rules 401 and 403 and more to do with whether
8 Plaintiff’s experts’ nine figure damage calculation “is so severe and oppressive as to be wholly
9 disproportioned to the offense and obviously unreasonable.” *Kenro Inc. v. Fax Daily, Inc.*, 962 F.Supp.
10 1162, 1165 (S.D. Ind. 1997) (quoting *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992)); *see*
11 *also Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 405 (E.D. Pa. 1995) (noting that the statutory
12 damages allowed under the TCPA were designed by Congress to be sufficient to incentivize individual
13 actions and that class actions posed the risk of “horrendous, possibly annihilating punishment,
14 unrelated to any damage to the purported class”).

15 **Due process** is implicated where statutory, “adding-machine” damages are sought under these
16 circumstances. *See, e.g., State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419, 425 (2003)
17 (“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive
18 or arbitrary punishments on a tortfeasor”); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580
19 (1996) (the “most commonly cited indicium of an unreasonable or excessive punitive damages award
20 is its ratio to the actual harm inflicted on the plaintiff”); *Hale v. Morgan*, 22 Cal.3d 388, 404-405
21 (1978) (where the damages are “mandatory, mechanical, potentially limitless in its effect, regardless of
22 the circumstance... We are of the view... the amount of the penalties is constitutionally excessive.”).

23 TCPA damages, while not facially unconstitutional, “may become unconstitutional as applied
24 in an individual case.” *Maryland v. Universal Electronics, Inc.*, 862 F.Supp.2d 457, 465 (D. Md. 2012)
25 (“In such situations, a damages award may violate due process or constitute an ‘excessive fine’ under
26 the Eighth Amendment.”) In *Maryland*, the statutory damages under the TCPA would have been
27 \$34,000,000, but the court only awarded \$1,000,000. *Id.* at 464-466. *See also Golan v. Veritas Entm’t,*
28 *LLC*, 2017 WL 3923162, at *4 (E.D. Mo. Sept. 7, 2017) (3,242,493 calls placed in violation of the

1 TCPA, “At \$500 per violation, the TCPA would require a damages award of \$1,621,246,500.00. This
 2 is obviously unreasonable and wholly disproportionate to the offense. The Court will award [\$10] per
 3 call. This reflects the severity of the offense.”); *See also Texas v. American Blastfax, Inc.*, 164
 4 F.Supp.2d 892, 900-901 (W.D. Tex. 2001) (“Although the TCPA provides for liquidated damages of
 5 \$500 for each violation, the Court finds it would be inequitable and unreasonable to award \$500 for
 6 each of these violations.” The court awarded 7 cents per violation.)

7 In determining the propriety of statutory damages under the TCPA, this Court has looked past
 8 the language of the TCPA and considered whether an award would be sufficient to deter future
 9 violations (e.g., whether the award is not a trivial amount in light of defendant’s financial position).
 10 *See Heidorn v. BDD Mktg. & Mgmt. Co., LLC*, 2013 WL 6571168, at *2 (N.D. Cal. Oct. 9, 2013) (J.
 11 Gonzalez Rogers). Rash Curtis submits that it should not be prevented from offering testimony or
 12 argument that the nine-figure award sought by Plaintiff is “obviously unreasonable and wholly
 13 disproportionate to the offense” in light of defendant’s financial position. *American Blastfax, supra*,
 14 164 F.Supp.2d at 900-901; *Heidorn, supra*, 2013 WL 6571168, at *2.

15 Dated: March 4, 2019

16 ELLIS LAW GROUP LLP

17 By 

18 Mark E. Ellis
 19 Attorneys for Defendant
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